INTERNATIONAL ARBITRATION OF JUSTICIABLE DISPUTES.

THE general arbitration treaties with Great Britain and France, signed at Washington on August 3, 1911, but subsequently amended by the Senate, and not yet ratified, provided for the arbitration of differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity," and thereby brought prominently before the public the question of what was meant by the word "justiciable." Opponents of the treaties attacked the word as being novel and indefinite. Even one of the most learned defenders of the treaties considered that it was "unfortunate that no better word than 'justiciable' could be found," as few people understood its meaning without a lengthy explanation, and any explanation led toward the borders of obscurity.[1] The present explanation is attempted, not so much on account of these particular treaties, as for the sake of showing that treaties for the arbitration of justiciable disputes are correct in theory because they are based upon the concept of legality, and that they are exceedingly practical because they simply apply to international law a well-established principle of national or municipal law. Nor are they as far behind treaties for the arbitration of all controversies of any nature whatsoever as is generally supposed.

"Justiciable" is defined in the Century Dictionary as "proper to be brought before a court of justice, or to be judicially disposed of." The word "jural" is sometimes used in a similar sense.[2]

If controversies between individuals were decided according to the judge's individual standard of right and wrong, the theory that some questions are not jural would not necessarily be recognized. The individual standard could be separately applied to every case and every conceivable question could thus be settled. Such may be the situation in primitive society where the ruler or judge sits to redress all grievances which may be brought before him and

[1] Simeon E. Baldwin in The Independent, Aug. 31, 1911.

[2] 1 Pomeroy's Equity Jurisprudence, 3 ed., 68, 69.

knows no limits to his jurisdiction. Early English chancellors sometimes administered equity in much the same way — by a personal rather than by a judicial conscience — and were deservedly criticized by Selden, because their consciences were as variable as the size of their feet.[3] But cases thus decided are more properly regarded as precedent to, rather than as a part of, any judicial system.[4] As soon as municipal law becomes systematic, it recognizes that all jural rights and wrongs are contained within a well-defined circle which may expand or contract, but outside which it is not competent to go. Even though, in the absence of express law, judges are required to act according to "natural law and reason," [5] the effect is merely to enlarge the area and not to abolish the circumference of the circle.[6]

In a Louisiana case,[7] where the wardens of a church sought to recover damages from the bishop of a diocese for improper management of church affairs, reliance was placed upon a provision of the civil code that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." [8] The defendant's contention that no cause of action was set forth "of which the court can, or ought, to take cognizance" was nevertheless sustained. The court said that the articles of the code were "not to be understood in their literal sense, as applicable indiscriminately to all acts whatever," that men are only liable for "illegal" acts and that courts of justice do not sit to enforce spiritual obligations. Similarly, courts do not assume jurisdiction over a large class of cases in which the damages are too trifling, remote, indefinite, or intangible to be assessed,[9] or over mere "moral claims not recognized by law," [10] or over mental conceptions not expressed in overt acts. "The thought of man shall not be tried," said Brian, C. J., in a case which arose several cen-

[3] Table Talk, *tit.* Equity.

[4] See Maine's Ancient Law, Ch. I.

[5] Merrick's Rev. Civ. Code of La., Art. 21.

[6] See Baker *v.* Louisiana Portable R. Co., 34 La. Ann. 754 (1882); Hoover *v.* Hoover, 30 La. Ann. 752 (1878).

[7] Wardens of the Church of St. Louis *v.* Blanc, 8 Rob. (La.) 51 (1844).

[8] Merrick's Rev. Civ. Code of La., Art. 2315. See also Art. 2316.

[9] See Weeks, Damnum Absque Injuria.

[10] Ohio & Mississippi R. Co. *v.* Kasson, 37 N. Y. 218, 224 (1867). See also 1 Bl. Comm. (3 ed., Cooley), 123 n., on "Moral Claims Often Called Rights."

turies ago, "for the devil himself knoweth not the thought of man." [11]

If a case involving a non-justiciable question is dismissed for lack of jurisdiction, the practical result is the same as if jurisdiction had been assumed but recovery denied. Consequently, it is frequently difficult to determine upon which theory a court has proceeded. Yet whether a dispute is justiciable so that it can be decided by the application of principles of law or equity is, of course, an entirely different question from whether a party has a good or bad cause of action.[12] If it cannot be so decided, relief is more properly denied on the former than on the latter theory.

Although disputes must be susceptible of decision by the principles of law or equity in order that municipal law may be applicable, yet its applicability is not defeated by the fact that independence, honor, vital interests, integrity of property, or interests of third parties are involved. In Sommersett's Case [13] and in the Dred Scott Case,[14] questions of personal independence were decided. Similar questions are every day involved in libels for divorce or applications for a writ of *habeas corpus*. In actions to recover damages for the use of defamatory words, questions of personal honor are decided without resort to violence. In a trial for murder, vital interests of the defendant are certainly at stake. In actions of ejectment or to establish boundaries or rights of way, integrity of property is constantly involved. Nor do courts necessarily decline to act, because the interests of third parties may be incidentally affected. A court of equity would enjoin Johanna Wagner from singing for Mr. Gye in violation of her contract with Mr. Lumley, even though it could acquire no jurisdiction over Mr. Gye. In other words, the exceptions with which treaties of international arbitration are ordinarily stultified, do not prevail in municipal law, which is administered in accordance with the test adopted in President Taft's proposed treaties.

That this test is not novel or indefinite is further shown by cases arising between federated states under constitutions or statutes

[11] Y. B. 7 Ed. IV, f. 2, pl. 2.

[12] See 1 Pomeroy's Equity Jurisprudence, 3 ed., 150, 151.

[13] 20 How. St. Tr. 1.

[14] 19 How. (U. S.) 393 (1856).

analogous to treaties between independent nations. From an examination of such cases, it appears that the test has been generally recognized and that the word "justiciable" has been frequently used.

Article III of the Constitution of the United States provides that the judicial power of the United States shall extend "to Controversies between two or more States," and that the Supreme Court shall have original jurisdiction in all such cases. Since this jurisdiction has been successfully invoked in a large number and variety of important cases and does not appear to be restricted to any particular class of controversies, it has frequently been argued that there is no logical reason why an international agreement to arbitrate all controversies of every nature whatsoever before an international court could not be put into equally successful operation. From the decisions of the Supreme Court involving the interpretation of this article it will, however, be found that the term "controversies" is not interpreted to include controversies of every nature whatsoever, but is limited in meaning to justiciable controversies.

It may be that this result could be reached upon the theory that inasmuch as the Supreme Court was granted only the "judicial power" of the United States, its jurisdiction was limited to the decision of cases which were capable of judicial settlement.[15] This theory involves merely a strict interpretation of the clause by which jurisdiction was conferred. Yet the Supreme Court does not appear to have relied upon or to have had this possibility in mind, at least in its more recent decisions.

In Missouri *v.* Illinois [16] the court said:

"From the language, alone considered, it might be concluded that whenever and in all cases where one State may choose to make complaint against another . . . the jurisdiction of this court would attach."

The court nevertheless considered that the jurisdiction was not as broad as the language would indicate, and proceeded to read into the federal Constitution exactly the same limitations upon

[15] See "The Development of the American Doctrine of Jurisdiction of Courts over States" by Alpheus Henry Snow, published May, 1911, by the American Society for Judicial Settlement of International Disputes.

[16] 180 U. S. 208 (1901).

judicial power as have been expressly set forth in President Taft's proposed treaties.

In Louisiana *v.* Texas[17] the state of Louisiana sought to enjoin the state of Texas and its officials from enforcing an alleged discriminative embargo under the guise and pretense of a quarantine regulation against yellow fever. The state of Texas demurred upon the ground among others that the matters complained of did not constitute a "controversy" within the meaning of the federal Constitution. In sustaining the demurrer and dismissing the bill Fuller, C. J., who delivered the opinion of the court, said:

"The jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly *justiciable.*

"Undoubtedly, as remarked by Mr. Justice Bradley in Hans *v.* Louisiana, 134 U. S. 1, 15, the Constitution made some things 'justiciable' which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction." [18]

The High Court of Australia has recently taken the same view as the Supreme Court of the United States as to the limits of its jurisdiction.[19] In a case brought by the state of South Australia against the state of Victoria for the determination of the boundary line between the two states, it was argued for the defendant state that the High Court had no jurisdiction, because the case involved a political or, at any rate, a non-justiciable question. Section 75 of the Australian Constitution provides that the High Court shall have original jurisdiction in "all matters between States." Although the court held that a question of boundaries was capable of determination on recognized legal principles and was, therefore, justiciable,

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[17] 176 U. S. 1 (1900).

[18] And Harlan, J., in his concurring opinion, said that the word "controversies" referred "to controversies or cases that are justiciable." See also Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265 (1888).

[19] The State of South Australia *v.* The State of Victoria, 12 C. L. R. 667 (1911).

it repeatedly expressed the view that "it is only where the matter in controversy between States is 'justiciable' that the High Court can entertain it."

Griffith, C. J. "I assent to the argument that the jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution." [20]

"In my opinion a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. This definition includes all controversies relating to the ownership of property or arising out of contracts." [21]

O'Connor, J. "The Australian Constitution . . . limits the power of settling disputes between States in boundary disputes, as in other cases, to those in which the matters in controversy can be determined by the application of recognized legal principles." [22]

Isaacs, J. "The first question is as to the jurisdiction of the Court to entertain the suit. This depends on the meaning of the word 'matters' in sec. 75 of the Constitution. In my opinion that expression, used with reference to the judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject and which therefore governs their relations, and constitutes the measure of their respective rights and duties.

"To extend the meaning of the term beyond this, would leave the Court without any limits of jurisdiction between States except the fact of some dispute, irrespective of cause or subject matter, and therefore possibly a controversy without any standard of right, but involving judicial interference with political and administrative action and discretion, a position unheard of, and altogether outside the pale of sober thought." [23]

It is interesting to note that O'Connor, J., reached his conclusions in spite of an impression that the Constitution of the United States conferred upon our Supreme Court unlimited jurisdiction to settle disputes between states. His reasoning on this point is as follows:

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[20] The State of South Australia *v.* The State of Victoria, *supra*, pp. 674, 675.
[21] *Id.*, p. 675. [22] *Id.*, p. 709. [23] *Id.*, p. 715.

"At the time when the latter Constitution was framed, boundary disputes existed between several of the States. As each State had full rights of sovereignty over its own territory, no common code of laws could be applied in the determination of these controversies, and in most cases they were settled as such disputes are usually settled between independent nations. In some cases principles of international law were appealed to, but much oftener considerations of fair dealing, public convenience, or political expediency were the bases of adjustment. The earlier Union or Confederation of States had vested in it the power to settle such disputes between States, and when, in the framing of the United States Constitution, the power to adjudicate in 'controversies between the States' was conferred on the Supreme Court of the United States, it was clearly intended to vest in that tribunal all the power of settlement and adjudication which up to then had been exercised by the Confederation, that is to say, the power to determine matters not justiciable as well as matters justiciable. The Supreme Court of the United States, in settling boundary controversies between States, has always acted on that view of its powers. That is made abundantly clear in one of the latest cases, Maryland *v.* West Virginia, 217 U. S. 1." [24]

Much weight might be given to the historical argument of O'Connor, J., particularly in view of the very broad language in the Articles of Confederation conferring upon Congress jurisdiction over "all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever," [25] were it not that the debates upon, and proposed drafts of, the Constitution clearly show that it was not intended to vest in the Supreme Court the same jurisdiction that had formerly been conferred upon the Continental Congress.[26] Moreover, Maryland *v.* West Virginia, which involves merely a question of boundaries between states, contains no language indicating that the court would ever assume to decide non-justiciable disputes between states, and Louisiana *v.* Texas and other cases already referred to clearly show that our Supreme Court has never taken so extended a view of its powers.

In a recent Canadian case [27] the same limitations upon jurisdiction were suggested, although not as clearly defined as in the Ameri-

[24] The State of South Australia *v.* The State of Victoria, *supra*, pp. 708, 709.
[25] Articles of Confederation, Art. IX. [26] See Missouri *v.* Illinois, *supra*.
[27] Dominion of Canada *v.* Province of Ontario, [1910] A. C. 637.

can and Australian cases. The Dominion of Canada sought to recover from the Province of Ontario for certain expenditures which it had independently made for good and sufficient reasons of its own, but which had resulted in direct advantage to the other. The case originally came before the Canadian Court of Exchequer under a statute giving it jurisdiction "of controversies between the Dominion of Canada and this Province." [28] The statute was not in its terms limited to justiciable controversies. It was accordingly argued by counsel for the Dominion that "even if no principle of municipal law could be found applicable, the case should be governed on such principles of equity and fairness as regulate the respective rights and obligations of distinct and independent States." Upon appeal to the Judicial Committee of the Privy Council, Lord Loreburn, however, said:

"Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. . . . In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable."

In view of this well-settled principle that municipal courts assume jurisdiction only over justiciable disputes between individuals and in view of the strong tendency shown by the highest courts of the United States, Australia, and the British Empire to read similar limitations upon their jurisdiction into constitutions or statutes relating to quasi-international disputes, it may, perhaps, be asked: "Why advocate treaties for the arbitration of justiciable disputes between nations, when treaties for the arbitration of all disputes whatsoever might well be interpreted to have no broader meaning?" Or, to reverse the question: "Why go so far as to advocate treaties for unrestricted arbitration when the same result might be reached by treaties for the arbitration of justiciable disputes?"

In the first place, the two forms of treaties do not have the same interchangeable meaning in international that they might have

[28] R. S. Ont. 1897, c. 49, s. 1. See also R. S. Can. 1906, c. 140, s. 32.

in municipal law. This is due to the fact that international arbitration, unlike municipal law, is not limited to the determination of justiciable questions. Since an international tribunal may be constituted by agreement of the parties for the settlement of questions of any nature whatsoever, it has no inherent lack of jurisdiction to determine non-justiciable questions. If it is expressly constituted to settle a non-justiciable question, it cannot properly decline to take jurisdiction because the question is non-justiciable. Its jurisdiction is as broad as the terms of the treaty or other agreement by which it is constituted.

"By consent every possible difference, whether legal or political, can be settled by arbitration, whether the verdict is based on rules of international law, natural equity or compromise." [29]

In their availability for the settlement of non-justiciable questions, as well as in some of their other aspects, arbitration treaties are analogous to agreements between individuals to submit their differences to a specially constituted board of arbitrators instead of to the regular courts. Individuals may submit a question to arbitration, although neither one of them would have any standing in the regular courts.

"That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested is enough." [30]

It follows that an arbitration award between individuals like an arbitration award between nations is not always based upon recognized principles of law, for if the question submitted is not capable of determination upon any such principles, of course the award necessarily rests upon other grounds.[31]

Awards which are based upon considerations of expediency or compromise are likely to be far less satisfactory than awards which are based upon recognized legal principles. There is an indirect

[29] 2 Oppenheim on International Law, 18.

[30] Downing *v.* Lee, 98 Mo. App. 604 (1903), quoting Morse on Arbitration and Award, 36.

[31] See Lawrence on International Law (4 ed., revised), 580, as to nations; as to individuals *cf.* Leslie *v.* Leslie, 50 N. J. Eq. 103, 108 (1892), where the court said as to the powers of arbitrators: "In cases where they do not intend to let the law govern their judgment, but to decide according to their own notion of what is just and right, the courts will not interfere, but allow their award to stand."

tendency to discourage the arbitration of differences between individuals which cannot be settled upon legal principles, by confining submissions under state statutes to controversies which are capable of sustaining a civil action.[32] As to controversies between nations, it is well recognized that arbitration is a far more effective method of settling justiciable than non-justiciable questions.

"In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle." [33]

Indeed, if the growing tendency to confine the object of international arbitration to "the settlement of disputes between States . . . on the basis of respect for law" [34] is to prevail, then non-justiciable disputes will have to be excluded either implicitly or expressly from arbitration treaties. The scope of international arbitration would then correspond exactly to the scope of municipal law as administered by the courts. Non-justiciable disputes which diplomacy had failed to adjust could be settled by mediation more properly than by arbitration. A mediator

"ought not to insist scrupulously upon exact justice. He is a conciliator and not a judge; his function is to procure peace; and he ought to induce one who has law on his side to concede something if it is necessary." [35]

The preceding remarks may seem somewhat reactionary to pacifists who hope for and ultimately expect a world treaty for the arbitration of all international disputes without reservations. On the other hand, it may well be that the desired result can better be attained by treaties like those proposed by President Taft than by those of the Central American type:[36] first, because they will

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[32] See 3 Cyc. 591, for cases arising under such statutes.

[33] Second Hague Conference: Convention for Settlement of International Disputes, Article XXXVIII.

[34] *Id.*, Article XXXVII.

[35] Vattel, Le Droit des Gens, Liv. II. ch. xviii, § 328.

[36] In 1907, Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador agreed to submit to arbitration "all controversies or questions which may arise among them,

meet with less opposition from opponents of the international peace movement in that they do not appear to be so extreme; and secondly, because the test of justiciableness, like the principles of municipal law, can be readily expanded to keep pace with the development of international civilization and the requirements of international opinion. The first reason is sufficiently obvious; the second may require some explanation.

As already suggested, a court which has unlimited jurisdiction over disputes between individuals or federated states determines all disputes between them of a justiciable nature and no others. But with the growth and development of municipal law the number and character of disputes which are transferred from the non-justiciable to the justiciable docket constantly increases. The development of the law of quasi-contracts in modern times is one of the best illustrations. By applying general principles of natural justice and equity to the affairs of everyday life, Lord Mansfield brought within the jurisdiction of courts of common law a mass of questions which would formerly have been considered only in a court of morals.

There is no reason why international law, like the common law, should not expand in such a way that an ever-increasing number of questions will be considered "susceptible of decision by the application of the principles of law or equity."

In Dominion of Canada *v.* Province of Ontario, Lord Loreburn considered that there was no principle of law upon which the claims of the Dominion could be sustained, although he added that as a matter of fair play the province, perhaps, ought to be liable for some part of the expenditure which had resulted to its advantage. Law and fair play might, however, have been brought into harmony by only a very slight expansion of the principles of quasi-contracts as expressed in the maxim *Nemo debet locupletari ex alterius incommodo.*

In 1295, Edward I's court declared in solemn fashion that it would not entertain pleas of defamation.[37] Although such pleas doubtless involved questions of personal honor, yet the king's

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of whatsoever nature, and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding." Supplement to 2 Am. J. Int. Law, 231–243.

[37] 2 Pollock and Maitland, History of English Law, 535.

courts later assumed jurisdiction over them without difficulty. Similarly, international tribunals have always been reluctant to deal with insults or indignities to nations, but why should they not follow the king's courts and take jurisdiction? International law is entirely competent to treat questions of national honor as well as numerous other questions as justiciable, whenever international public opinion so demands. Indeed, on account of its derivation from the law of nature, its comparative freedom from technicalities, and the character of its litigants, its powers of expansion should be far greater than those of the common law. It has been well said by our own Supreme Court that "great states have a temper superior to that of private litigants," and that a case between them "is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy." [38]

"In international arbitration the concept of legality tends to broaden out into interpretations which are based upon ideas of equity, justice, and fair dealing. The term 'justiciable' is, therefore, not confined to what is legal in the strictest sense of the word, but it also, if we consult the recent experience of nations, would be held to cover any matters in which a definite ascertainment of international duty and propriety is desirable. Whenever the rightfulness and justice of conduct is capable of determination by a body of impartial judges, a judicial question exists." [39]

If international law is capable of expansion until it regards all matters in which a definite ascertainment of international duty and propriety is desirable as "justiciable controversies," then treaties which provide for the arbitration of all such controversies will become all-sufficient. A claim which could not be brought within this broad conception of justiciableness would not receive or deserve recognition in the family of nations. If under a treaty for the arbitration of all justiciable controversies, such a claim were submitted and were dismissed as not justiciable, the dismissal would be equivalent to the finding that the claim was not proper or just. Further action on the claim should then be considered as barred as effectually as if the court had taken jurisdiction and denied the claim. Thus, by such treaties, the same result might

[38] Virginia *v.* West Virginia, 220 U. S. 1 (1911).

[39] Paul S. Reinsch in 5 Am. J. Int. Law, 607.

ultimately be reached as by more radical treaties referring to arbitration all disputes of every nature whatsoever. If international arbitration is to be developed as a method for the judicial settlement of international disputes rather than as a method of conciliation and compromise, the conservative form of treaty may be the more desirable, because it is the more judicial.

William W. Thayer.

CONCORD, NEW HAMPSHIRE.